

in priority order, of projects and an approved budget figure for each project. The Lake Tahoe projects do not receive a contingency percentage in addition to the requested amount because contingencies are calculated into the cost estimate when projects are nominated. The Secretary of Interior's decision may, on a round by round basis, approve priority funding for Lake Tahoe projects and may also authorize the TREX to reallocate costs between projects under certain specific circumstances. The approval for each round should be reviewed to see whether or not these associated approvals were provided.

VII. 2005 SOLICITOR'S OPINION REGARDING INTERPRETATION OF SNPLMA

A February 25, 2005, Office of the Solicitor opinion regarding interpretation of the SNPLMA determined that funds in the SNPLMA and FLTFA Special Accounts are considered appropriated funds. Therefore, the fundamental appropriation doctrine of "Necessary Expense" will now govern payment of costs associated with projects and acquisitions approved by the Secretaries. For a cost to be considered a necessary expense of the project or acquisition it must meet three criteria:

1. The expenditure must "make a direct contribution to carrying out the appropriation" which in the case of SNPLMA and FLTFA are expenditures authorized by Congress in SNPLMA and FLTFA as reflected in the projects and acquisitions approved by the Secretary of the Interior and Secretary of Agriculture;
2. The expenditure must not be prohibited by law; and
3. The expenditure must not be covered by another more specific source of funding, i.e., the specific approved project or acquisition must not be provided for in another appropriation or statutory funding scheme.

Direct Versus Indirect Costs

The necessary expense doctrine does not differentiate between direct and indirect costs. Therefore the prior prohibition to requesting indirect costs no longer applies. Nonetheless, Federal agencies and local and regional governmental entities shall not seek, and the BLM will not pay, the agency/entity standard overhead percent based on the total project cost. However, project-related indirect costs for support services may be charged at a percent based on staff time spent on the project(s), provided these expenses meet the three criteria above. Examples of such indirect costs would be secretarial support, printing, copying, cost-center expenses, etc. (See Appendix B-9 for other examples of necessary expenses.) Federal agencies and local and regional governmental entities are solely responsible for seeking any waivers from their headquarters and resolving any issues internally regarding not being allowed to assess such generic overhead charges.

Authority of Executive Committee to Determine Allowable Expenses

The Solicitor's Opinion upheld the authority of the SNPLMA Executive Committee to determine which necessary expenses, regardless of whether they are direct or indirect costs, are "permissible" for payment from the SNPLMA Special Account. The Executive Committee has authorized certain specific necessary expenses and certain categories of "Other Necessary Expenses" (see Appendix B-1 to B-8 for estimated expense sheets and appendix B-9 for examples of "Other Necessary Expenses"). Disputes between any agency/entity and the SNPLMA Division over whether or not a requested expense is authorized will be resolved by the Executive Committee.

Payments from the Special Account

The Solicitor's Opinion also provided recommendations regarding payments from the SNPLMA and FLTFA special accounts to Federal agencies. The opinion advised that SNPLMA does not authorize "advance payments." Further, although the SNPLMA does not include a general authority to utilize reimbursement of funds, reimbursement may be utilized under the Economy Act if applicable. The Solicitor advised that the Executive Committee revise the SNPLMA Implementation Agreement to provide for payment of an Agency's necessary project expenses without use of the reimbursement mechanism and that "payments for approved projects should be made at logical stages in the life of a project while it is being implemented."

Project reimbursements/payments are made to the eligible agency/entity for which the projects were approved with one exception. That exception is payment for consultation with the Fish and Wildlife Service under the Endangered Species Act. This consultation is required for many projects across all project categories. Due to the extensive number of required consultations, funds for the Endangered Species Act consultation will be transferred directly to the FWS on a project-by-project basis following the transfer process below. The agencies/entities and FWS will identify those projects requiring such consultation and provide an estimate of the cost of the consultation as a separate line item on the Estimated Necessary Expense Form (Appendix B-1 to B-8), so that the SNPLMA Division can effect the transfer in a manner that allocates consultation costs to the appropriate projects.

VIII. SPECIAL ACCOUNT "1151" TRANSFER PROCESS FOR ALL PROJECT CATEGORIES

In April 2005, in response to the Solicitor's Opinion described above, the Director, Office of Budget, Department of the Interior (DOI), sent a memorandum to the Chief, Interior Branch, Office of Management and Budget (OMB), stating that the Department of Interior and the U.S. Forest Service requested an allocation account, more commonly termed a parent/child account, to be established for the SNPLMA program. This action was initiated after managers from both agencies reviewed the Solicitor's opinion and their budget execution options and statutory authority and concluded that the SNPLMA program should be classified as an allocation account, i.e., meaning "a delegation, authorized in law, by one agency of its authority to obligate budget authority and outlay funds to another agency. When an agency makes such a delegation,